Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

NO. 77-791

CROSSROADS BOOKS, INC.

Petitioner

V.

TOA ENTERPRISES, INC.

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

LOUIS J. MARIN
1311A Dolley Madison Blvd.
McLean, Virginia 22101
(703) 893-5551

Counsel for Respondent

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7788

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BRIEF IN OPPOSITION TO
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THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent TOA Enterprises, Inc., the Complainant below, hereby prays that the Petitioner's Petition for Writ of Certiorari to the Supreme Court of

the United States be denied for the reasons hereinafter set forth.

OPINIONS BELOW

At the conclusion of the Trial, his Honor James Keith stated:

> "I think that the Lease was violated under Paragraph eleven (11). The Tenant used the property for an unlawful activity; that is, for a purpose contrary to law and they violated Paragraph eleven (11) of the Lease, and that it constituted a default in the performance by the Tenant, that the Landlord gave written notice as evidence by, I think it is, Exhibit No. 3 or 4 - anyway, the letter from Mr. Marin, and he had a right to terminate the Lease." (A.89)

The final decree entered by the Circuit Court of Fairfax County, Virginia, recites:

> "And the Court having considered the said Bill of Complaint, the exhibits filed by the Complainant, and the testimony of all witnesses, this Court does hereby find

> that Defendant, Crossroads Books, Inc., has violated the provisions of Article eleven (11) of the Lease Agreement dated September 8, 1975 by and between TOA Enterprises, Inc., and Crossroads Books, Inc., which violation constitutes a default under the terms of said Lease by Defendant [Crossroads Books, Inc.]. Accordingly, it is hereby:
>
> ADJUDGED, ORDERED AND DECREED, that said Lease is hereby terminated, the Complainant is entitled to possession of the premises and the Defendant is hereby ordered to vacate; and...."

QUESTIONS PRESENTED

The Respondent takes exception to the Petitioner's statement of the questions presented, and believes the matter before the Court may be more simply phrased as follows:

1. Whether the First or Fourteenth Amendments to the Constitution of the United States impose restrictions upon the termination of a lease by a landlord

for the tenant's violation of a covenant not to use, permit, or suffer the use, of the demised premises for any purpose contrary to law.

STATEMENT OF THE CASE

1. The use provision of the Lease under which the Petitioner is the Tenant provides as follows:

> "Article 11, Tenant agrees not to use or occupy or suffer or permit said permises or any part thereof to be used in any manner or occupy for any purpose contrary to law or the rules or regulations of any public authority...."

2. With reference to the Petitioner's statements on page 8 of the Petition describing the criminal proceedings against Mr. Allan Sands, employee of the Petitioner, the record is clear.

In Criminal Case No. 22429 and in Criminal Case No. 22430 in the Circuit Court of Pairfax County for the State

of Virginia, Commonwealth of Virginia vs. Allan R. Sands, Defendant, in both cases, the Honorable William G. Plummer entered a Judgment Order of Conviction in each of the two cases pursuant to the findings of the jury in each case on the 3rd day of March, 1976. Mr. Sands was sentenced to serve twelve (12) months in jail for each of the two felony convictions. These Judgments of Conviction remain among the official court records as final Judgment Orders. (Resp. A.1, & A.6)

3. The Order of the Trial Court is based upon a finding that the use clause of the Lease, Article 11, was violated by the Tenant, Petitioner, herein, which entitles the Plaintiff, your Respondent, to terminate the Lease as a matter of law in the State of Virginia. No Constitutional issue was presented before the Court nor was any Constitutional question revelant to the issues presented

to the Trial Court in deciding a basic tenant-landlord dispute. In accordance therewith, the Constitutional rights of the Petitioner and the Respondent were maintained and upheld in the State Court of Virginia.

The Respondent reserves the right to offer additional refinements to the Petitioner's statement of the case should the Writ of Certiorari be granted by this Court.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE PETITION FOR WRIT FOR CERTIORARI SHOULD BE DENIED FOR FAILURE OF PETITIONER TO MAKE A PROPER AND TIMELY ASSERTION OF ITS FEDERAL CLAIM IN THE VIRGINIA STATE COURTS.

The threshold procedural requirement for Supreme Court review upon Writ of Certiorari is that the tendered federal questions have been presented in a timely

and proper fashion to the state courts. Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200 (1975). This requirement is regarded as jurisdictional, and the party seeking review must carry the burden of proving that the federal questions were presented to the state courts. Wright & Miller, Federal Practice and Procedure, §4022, Vol. 16, p. 697 (1977 ed.) Where the highese court of a state has failed to pass upon a federal question "...it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in [the Supreme] Court [of the United States] can affirmatively show the contrary." Street v. State of New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360 (1969) (per Harlan, J.)

The Petitioner herein asserts deprivation of its First and Fourteenth

Amendment rights by the Virginia State court proceeding. First Amendment rights are alleged to have been violated when the Trial Court, sitting in equity, terminated a lease upon finding that the tenant used, permitted, or suffered use, of the property for an unlawful activity in violation of the lease terms. The Fourteenth Amendment claim apparently relates to the Trial Court's consideration of the criminal obscenity conviction of the tenant's employee based upon conduct within the demised premises. Remarkably, however, the words "First Amendment" and "Fourteenth Amendment" do not once appear in argument, testimony or exhibits in the Trial Court proceedings. (A. 19 et.seq.) Indeed, federal questions were not raised by the Petitioner until its Petition for Rehearing was filed with the Virginia Supreme Court (A. 94-97), and even then the questions there presented were signi-

ficantly different from those before this Court in the instant Petition.

The Petitioner tangentially raised the issue in the Trial Court of whether the goods sold by the Petitioner were presumed not to be obscene until they were adjudicated to be so by a judicial body.[1/] (Petition, p. 10-12) Respondent submits, however, that this issue is not properly before this Court. What is before the Court is whether the First Amendment imposes restrictions on the manner in which a state court of equity may enforce covenants of a lease. The sale of certain items may or may not be constitutionally protected with regard to criminal prosecution, but that question is entirely separate from the issue of whether the

1/ Such an adjudication of the obscenity of goods sold by the Petitioner's employee was, in fact, made. (A.51-52).

sale of the same material may constitutionally be found by a court of equity to be within the contractual prohibitions to which a tenant may be bound. It is this latter question which truly represents the Petitioner's grounds for appeal, and yet this issue was never raised in the state court proceeding.

Even if First Amendment questions are found to have been adequately raised in the Trial Court proceedings, there is no basis for concluding that the Fourteenth Amendment issues were also so raised. The Petitioner states at page 10 of its Petition that the "Constitutional Rights of the Petitioner were raised in the Trial Court with special emphasis on the issue of obscenity...." This assertion is fanciful. If any Constitutional issues were implied, it was only with regard to obscenity. It is for this exact reason that the Petitioner apologizes at page

13 of the Petition by explaining that: "As a result of the unanticipated ruling of the Supreme Court of Virginia ...it became necessary to re-raise [by Petition for Rehearing] the federal question precisely as to the deprivation of due process of law, guaranteed...under the Fourteenth Amendment...." In fact, only upon the Petition for Rehearing did the Petitioner make its first significant claims of Constitutional protection; it was also at that time that federal case law was first cited by the Petitioner, but the federal question came too late for proper consideration by either Virginia or Federal Courts.

By not raising its federal questions prior to the Petition for Rehearing filed with the Virginia Supreme Court, the Petitioner has precluded itself from properly obtaining a Writ of Certiorari. Virginia law precludes appellate considera-

tion of contentions not made in the Trial Court. Parker v. McCoy, 212 Va. 808, 188 S.E. 2d 222 (1972); Clarendon House, Inc. v. Helfert, 213 Va. 28, 189 S.E. 2d 331 (1972). By not raising First or Fourteenth Amendment issues within the Trial Court, these issues are not properly preserved for purposes of Supreme Court review. In addition, "Questions first presented to the highest state court on a petition for rehearing come too late for consideration of the Federal Supreme Court on certiorari...." Radio Station WOW v. Johnson, 326 U.S. 120, 65 S.Ct. 1475 (1945). See Bloeth v. State of New York, 369 U.S. 133, 82 S.Ct. 661 (1962).

For failure to timely raise the federal questions in the proper fashion within the state courts, the Petition for Writ of Certiorari should be denied.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED DUE TO THE ABSENCE OF A FEDERAL QUESTION OF SUBSTANCE.

Rule 19 of the Rules of the United States Supreme Court provides that review by writ of certiorari will be granted only in cases which involve federal questions of substance. The Respondent contends that the state court judgment rests on an application of state law which makes it unnecessary to decide any federal questions, and that the state proceedings did not infringe upon any Constitutional rights of the Petitioner. Accordingly, no federal question of substance is presented within the meaning of Rule 19, and Respondent asks that certiorari not be granted.

A. The State Decree Rested on an Application of State Landlord-Tenant Law and Did Not Require Consideration of Any

Federal Questions, Thus Precluding Review upon Writ of Certiorari.

The Suit brought by the Respondent in the Circuit Court of Fairfax County, Virginia, was an action in equity to rescind a lease upon commercial property or terminate the lease for breach of a covenant therein. The Trial Court found that Petitioner, the Defendant therein, violated Article 11 of the Lease, and the Court therefore terminated the Lease. Article 11 reads, in pertinent part:

> "Article 11. Tenant agrees not to use or occupy or suffer or permit said premises or any part thereof to be used in any manner or occupied for any purpose contrary to law or the rules or regulations of any public authority...." (A.10)

It should be noted that the covenant does not prohibit merely illegal activity on the premises; rather it forbids use of the property "for any purpose contrary to law or the rules or regulations

of any public authority." [emphasis added]. The significance of this distinction is governed by state law, and the state court was free to construe the language of the covenant in accordance with state law.

The issues before the Trial Court were those which are present in any action upon a contract: determining the intentions of the parties, interpreting the meaning of the lease terms, ascertaining whether the tenant breached the lease covenants, and then fashioning an appropriate remedy. The terms of Article 11 of the Lease are very broad, and their application is purely a matter of state law which involves no federal questions.

Respondent introduced into evidence Exhibit Nos. 3 and 4 Judgment Orders of Conviction of Allan R. Sands, an employee of Petitioner, for the sale of two films entitled "Don't Let the Bedbugs Bite" and

"Succulent Housewife". Both Judgment Orders of Conviction were entered by the Honorable William G. Plummer on the 3rd day of March, 1976.

These Judgment Orders of Conviction became final after twenty-one (21) days from the date of entry in accordance with Rule 1:1 of the Rules of the Supreme Court of Virginia which provides that all Final Judgments, Orders and Decrees remain under the control of the Trial Court subject to modification or vacation for twenty-one (21) days after the date of entry and no longer. And in criminal cases notwithstanding the finality of the Judgment, the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error or supersedeas.

Rule 1:1 of the Virginia Supreme Court Rules was construed by the Supreme

Court of Virginia consistently over the years to determine the finality of a judgment in a criminal case notwithstanding the suspension of execution of the sentence. In a recent case, the Virginia Supreme Court held:

> "In a criminal case, the Trial Court may postpone execution of the sentence in order to give an accused the opportunity to apply for a writ of error and supersedeas. However, this does not affect the finality of the judgment, and the Trial Court loses control over it after an elapse of twenty-one (21) days from the date of its entry. (Hirschkop v. Commonwealth, 209 Va. 678, 166 S.E. 2d 322, Cert denied, 396 U.S. 845, 90 S.Ct. 72, (1969)."

In accordance with the previous holdings of the Supreme Court of Virginia and in accordance with Rule 1:1 of the Rules of the Supreme Court of Virginia, the Trial Court determined that the entry of the Judgment Orders of Conviction by Judge Plummer on the 3rd day of March, 1976, became final twenty-one (21) days

thereafter and still remain as final Judgment Orders of two felony convictions of Allan R. Sands, employee of Petitioner; and, the Trial Court lost control over these final Judgment Orders after the elapse of twenty-one (21) days from the date of their entry.

A State Court has great leeway in applying lease terms identical or similar to those employed by Article 11. The State Court may infer an obligation to use the property lawfully and for lawful purposes as in Martin v. Medlin, 81 Ga. App. 602, 59 S.E. 2d 519 (1950). State law may provide that mere knowledge by the tenant that immoral and unlawful conduct is being carried on within the leased premises is sufficient to allow recission of the lease. Voghtv. State, 24 N.E. 680 (Ind. 1890). A State might decide to modify New York's rule by holding that a tenant as well as an undertenant is bound

by guilty pleas of its employees to the sale of pornographic photographs. See 220 West 42 Associates v. Cohen, 302 N.Y.S. 2d 494 (1969). As is stated in Lindsay v. Normet, 405 U.S. 56, 92 S.Ct. 862 (1972), the Constitution has not federalized the substantive law of landlord-tenant relations, and therefore it is state law which governs.

It is the proclaimed policy of the Supreme Court to refuse to decide a federal question that is or might be controlled by a state ground of decision. Bell v. State of Maryland, 378 U.S. 439, 84 S.Ct. 1814 (1964). The Virginia courts have ruled that sufficient grounds for termination of the lease were shown by the Respondent. There are a number of ways in which the Petitioner's conduct might have been found to be in violation of the lease covenant, whether this conduct be done individually or through Petitioner's

employees, be it an express violation of law or merely against public policy, be it explicitly proscribed by the lease or merely found to be against the intentions of the parties, and be it an isolated incident or part of a sequence of illegal acts. The lower State courts might be right or wrong, but any remedy for error in applying State law rests with the State courts and legislature, and is not properly the subject of review by the Federal Courts.

B. No Substantial First or Fourteenth Amendment Issues Are Presented by the Petition for Writ of Certiorari.

The Petitioner contends that the action of the Trial Court in terminating its Lease with the Respondent Landlord imposes a "chill" on its First Amendment rights. The State Courts, however, merely

applied the terms of the Lease Agreement between the parties to the facts and evidence before it. If the Lease, as applied, meets Constitutional scrutiny, then the State Court's decree cannot be reversed on First or Fourteenth Amendment grounds.

Lindsay v. Normet, supra, provides that the Constitution has not federalized the substantive law of landlord-tenant relations. Moreover, the Court in Lloyd Corp. v. Tanner, 407 U.S. 551, 92 S.Ct. 2219, rejecting the holding in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 88 S.Ct. 1601, ruled that:

> "The First and Fourteenth Amendments safeguard the right of free speech and assembly by limitations on State action, not an action by the owner of private property used nondiscriminatorily for private purposes only." 407 U.S. at 567, 92 S.Ct. at 2228 [emphasis supplied].

Lloyd then went on to hold that the owners of a shopping center were not prevented by the First Amendment from prohibiting distribution of handbills on its property. The Lloyd rationale was confirmed in Hudgens v. National Labor Relations Board, 424 U.S. 507, 96 S.Ct. 1029 (1976), where the Court ruled that union picketing at a shopping center was not protected by the First Amendment.

The rationale of Lloyd and Hudgens is directly applicable to the case at bar. Your Respondent, as the owner of a shopping center objected to the conduct of the Petitioner on Respondent's property, and ultimately prevailed in the State Courts on the theory of violation of the private property. Your Respondent is Constitutionally allowed to impose contract limitations on what might otherwise be First Amendment rights of the Petitioner

if exercised on public property. The First and Fourteenth Amendments are inapplicable to conduct by private persons, and the Petitioner thus fails to base his Petition upon substantial federal grounds.

CONCLUSION

The Respondent asserts that insufficient grounds exist for granting the Petition for Writ of Certiorari in that the Petitioner failed to make a timely and proper assertion of its federal questions in the State Courts, and further, that the Petition fails to present federal questions of substance. The construction and application of the Lease is governed by State law, as is the evidence which may be considered by the State Court, the weight to be given to a criminal conviction of an employee, and the scope of review by the State of the Trial Court's decision. Finally, the First and Fourteenth Amendments

are believed to be inapplicable to the Respondent's action to terminate the Lease because no "State action" is involved.

WHEREFORE, the Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LOUIS J. MARIN
Counsel for Respondent
1311A Dolley Madison Blvd.
Suite 3B
McLean, Virginia 22101
(703) 893-5551

APPENDIX "A"

PLAINTIFF'S TRIAL EXHIBIT NO. 3

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	Indictment
	)	Selling an
	)	Obscene Film
vs.	)	
	)	
ALLAN R. SANDS	)	NO. 22430

This 3rd day of March, 1976, came the Commonwealth, by her Attorney, and the Defendant, ALLAN R. SANDS, who stands indicted for a felony, to-wit: selling an obscene film, appeared agreeably in accordance with his recognizance of bail; also appeared Thomas J. Morris, Counsel for the Defendant.

Thereupon, the Court Reporter was sworn.

Whereupon, the roll was called and the following jurors took their seats in

the jury box, to-wit: Mrs. Alicia Boyd, Mrs. Ruby Schurtz, Alvin Fones, Miss Cynthia K. Lowery, J. T. Coffman, Mrs. Carole Seal, Leslie Mathias, Frank J. Hammond, David Leuthold, Mrs. Mary Lynn Acker, Mrs. Louise Hardardt and Edward Filipek.

Thereupon, the jury received instructions of the Court, heard the closing argument of the Attorney for the Commonwealth and of Counsel for the Defendant and rebuttal argument of the Attorney for the Commonwealth, and were sent to their room to consult upon their verdict, and after some time returned into Court and rendered the following verdict, to-wit:

> "We, the jury, on the issue joined in the case of Commonwealth of Virginia versus Allan R. Sands, regarding the film "Succulent Housewife," find the Defendant guilty as charged in the indictment.
>
> Leslie N. Mathias
> Foreman."

Thereupon, the jury proceeded to hear argument on behalf of the Commonwealth and of the Defendant in regards to sentencing and were sent to their room to consult upon their sentence, and after some time returned into Court and rendered the following sentence, to-wit:

> "We the Jury, on the issue joined in the case of Commonwealth of Virginia versus Allan R. Sands, Defendant, regarding the film "Succulent Housewife", fix the Defendant's punishment at (12) months in jail.
>
> Leslie N. Mathias
> Foreman."

Thereupon, the jury was discharged.

Thereupon, it was demanded of him, ALLAN R. SANDS, if anything he knew or had to say why the Court should not proceed to pass sentence and judgment upon him, and nothing being offered or alleged in delay of judgment, it is ADJUDGED and ORDERED that ALLAN R. SANDS do serve twelve (12) months in jail.

Thereupon, the Court proceeded to advise the Defendant of his right to appeal from the sentence theretofore imposed, including the right to have an attorney appointed for him and to have the attorney's fees, costs and expenses in connection with an appeal paid for him in the event he is financially unable to pay the same.

Thereupon, Counsel for the Defendant moved the Court to suspend the execution of sentence in this case and continue the Defendant on bond pending post-trail motions, which motion the Court granted, and this case is hereby continued to the 9th day of April, 1976, for hearing on post-trial motions.

The bond in this case is hereby increased to $2,500.00.

The Defendant is continued on bond, conditioned upon the posting of the

increased bond and that he do [does] not engage in the selling of any type of pornography.

/S/ WILLIAM G. PLUMMER
JUDGE

APPENDIX "B"

PLAINTIFF'S TRIAL EXHIBIT NO. 4

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	Indictment
	)	Selling an
	)	Obscene Film
	)	
vs.	)	
	)	
ALLAN R. SANDS	)	NO. 22429

This 3rd day of March, 1976, came the Commonwealth, by her Attorney, and the Defendant, ALLAN R. SANDS, who stands indicted for a felony, to-wit: selling an obscene film, appeared agreeably in accordance with his recognizance of bail; also appeared Thomas J. Morris, Counsel for the Defendant.

Thereupon, the Court Reporter was sworn.

Whereupon, the roll was called and the following jurors took their seats in

the jury box, to-wit: Mrs. Alicia Boyd, Mrs. Ruby Schurtz, Alvin Fones, Miss Cynthia K. Loerty, J. T. Coffman, Mrs. Carole Seal, Leslie Mathias, Frank J. Hammond, David Leuthold, Mrs. Mary Lynn Acker, Mrs. Louis Hardardt and Edward Filpek.

Thereupon, the jury received instructions of the Court, heard the closing argument of the Attorney for the Commonwealth and of Counsel for the Defendant and rebuttal argument of the Attorney for the Commonwealth, and were sent to their room to consult upon their verdict, and after some time returned into Court and rendered the following verdict, to-wit:

> "We the Jury, on the issue joined in the case of Commonwealth of Virginia versus Allan R. Sands, Defendant, regarding the film "Don't Let the Bedbugs Bite," find the Defendant guilty as charged in the indictment.
>
> Leslie N. Mathias
> Foreman."

Thereupon, the jury proceeded to hear argument on behalf of the Commonwealth and of the Defendant in regards to sentenc-int and were sent to their room to consult upon their sentence, and after some time returned into Court and rendered the follow-ing sentence, to-wit:

> "We, the Jury, on the issue joined in the case of Commonwealth of Virginia versus Allan R. Sands, Defendant, regarding the film "Don't Let the Bedbugs Bite," fix the Defendant's punishment at (12) twelve mo. in jail.
>
> Leslie N. Mathias
> Foreman."

Thereupon, the jury was discharged.

Thereupon, it was demanded of him, ALLAN R. SANDS, if anything he knew or had to say why the Court should not proceed to pass sentence and judgment upon him, and nothing being offered or alleged in delay of judgment, it is ADJUDGED and ORDERED that ALLAN R. SANDS do serve twelve (12) months in jail.

Thereupon, the Court proceeded to advise the Defendant of his right to appeal from the sentence heretofore im-posed, including the right to have an attorney appointed for him and to have the attorney's fees, costs and expenses in connection with an appeal paid for him in the event he is financially unable to pay the same.

Thereupon, Counsel for the Defend-ant moved the Court to suspend execution of sentence in this case and continue the Defendant on bond pending post-trial motions, which motion the Court granted and this case is hereby continued to the 9th day of April, 1976. Bond in this case is hereby increased to $2,500.00.

The Defendant is continued on bond, conditioned upon the posting of the in-

creased bond and that he do [does] not engage in the selling of any type of pornography.

/S/ WILLIAM G. PLUMMER
JUDGE

APPENDIX "C"

RULES OF THE SUPREME COURT OF VIRGINIA

RULE 1:1. FINALITY OF JUDGMENTS, ORDERS AND DECREES.

All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, shall not extend the time limits hereinafter prescribed for applying for a writ of error.